

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Jul 16, 2020**

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DARIN FOSTER,

Plaintiff,

v.

THE STATE OF WASHINGTON; THE  
WASHINGTON STATE PATROL; and  
JOHN BATISTE, in his official capacity  
only,

Defendants.

NO. 1:20-CV-03048-SAB

**ORDER RE: DEFENDANTS'  
MOTION TO DISMISS AND  
PLAINTIFF'S CROSS-  
MOTION TO AMEND**

Before the Court are Defendants' Motion to Dismiss, ECF No. 3, and Plaintiff's Cross-Motion to Amend Complaint, ECF No. 8. The motions were considered without oral argument. Having reviewed the parties' briefing and the relevant caselaw, the Court grants in part and denies in part Defendants' Motion to Dismiss, and denies Plaintiff's Cross-Motion for Leave to Amend.

**FACTS**

This case arises under the Uniform Services Employment and Reemployment Rights Act, 38 U.S.C. § 4311(a)-(b), et. seq (USERRA), and the Civil Rights Act, 42 U.S.C. § 1983. ECF No. 8-1.

Darin Foster is an honorably discharged veteran of the U.S. Air Force and a current member of the Washington State Patrol. ECF No. 8-1 at 1:1, 7:24. During the course of his employment, Plaintiff requested that Defendants apply veteran

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1 preference points to the Patrol's promotional examination process pursuant to state  
2 law. ECF No. 8-1 at 4:6. Plaintiff alleges that Defendants did not initially award  
3 him the veteran points to which he was entitled. ECF No. 8-1 at 5:10. When  
4 Defendants eventually awarded Plaintiff veteran preference points, Plaintiff argues  
5 they were attributed to the wrong date. Plaintiff believes this resulted in delayed  
6 promotion and income loss.

7 Plaintiff initially brought suit under USERRA and § 1983 in Yakima County  
8 Superior Court. In particular, Plaintiff alleged that Defendants violated his Fifth  
9 Amendment right to property by depriving him of the proper application of his  
10 veteran promotional points on the date that they should have been applied. Plaintiff  
11 also argues that Defendants' conduct was not objectively reasonable and that  
12 Defendants acted arbitrarily by applying the veteran preference points to the wrong  
13 date. Defendants removed the action to this Court on April 15, 2020. ECF No. 1.

14 In his initial Complaint, Plaintiff listed as Defendants the State of  
15 Washington, the Washington State Patrol, and Chief John Batiste in his official  
16 capacity only. Defendants subsequently moved for an order dismissing Plaintiff's  
17 § 1983 claims in their entirety, arguing that Defendants are not "persons" within  
18 the meaning of the statute. In response and on a Cross-Motion to Amend, Plaintiff  
19 conceded the named Defendants were not "persons" amenable to suit under §  
20 1983. Plaintiff's response memorandum claims that the proposed Amended  
21 Complaint names Chief Batiste in his individual capacity only. However,  
22 Plaintiff's proposed caption names each original Defendant as a party to the suit  
23 and continues to list Defendant Batiste as an official capacity defendant.  
24 Defendants submitted a reply memorandum in support of their motion to dismiss.

#### 25 **RULE 12 (b)(6) STANDARD**

26 On a motion to dismiss, all well-pleaded allegations of material fact are  
27 taken as true and construed in a light most favorable to the non-moving party.  
28 *Wyer Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir.

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1 1998). Under Federal Rule of Civil Procedure 12(b)(6), a complaint “should not be  
2 dismissed unless it appears beyond doubt that [the] plaintiff can prove no set of  
3 facts in support of his claim which would entitle him to relief.” *Hydranautics v.*  
4 *FilmTec Corp.*, 70 F.3d 533, 535-36 (9th Cir. 1995).

5 Federal Rule of Civil Procedure 8(a)(2) requires that each claim in a  
6 pleading be supported by “a short and plain statement of the claim showing that the  
7 pleader is entitled to relief.” To satisfy this requirement, a complaint must contain  
8 sufficient factual content “to state a claim to relief that is plausible on its face.”  
9 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Levit v. Yelp!, Inc.*,  
10 765 F.3d 1123, 1135 (9th Cir. 2014) (requirements of notice pleading are met if  
11 plaintiff makes a short and plain statement of their claims). A claim for relief is  
12 plausible on its face “when the plaintiff pleads factual content that allows the court  
13 to draw the reasonable inference that the defendant is liable for the misconduct  
14 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating whether a  
15 complaint states a plausible claim for relief, courts rely on “judicial experience and  
16 common sense” to determine whether the factual allegations, which are assumed to  
17 be true, “plausibly give rise to an entitlement to relief.” *Id.* at 679.

#### 18 **DEFENDANTS’ MOTION TO DISMISS**

19 The first inquiry is whether states and state agency defendants are  
20 susceptible to suit under 42 U.S.C. § 1983. The Eleventh Amendment bars actions  
21 for equitable relief in a federal court by (1) a citizen against a state; and (2) a  
22 citizen against a state official acting in his official capacity. *Edelmann v. Jordan*,  
23 415 U.S. 651, 677-78 (1974); *Quern v. Jordan*, 440 U.S. 332, 337 (1979).  
24 Likewise, § 1983 does not provide a federal forum for litigants who seek a remedy  
25 against a state for alleged deprivations of their civil liberties. 42 U.S.C. § 1983; *see*  
26 *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 63 (1989). Plaintiff concedes  
27 this point. ECF No. 8 at 1. Thus, dismissal of the claims against Defendants State  
28 of Washington and the Washington State Patrol is proper.

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1        However, neither the Eleventh Amendment nor § 1983 bar claims against  
2 state officials in their personal capacities. *Hafer v. Melo*, 502 U.S. 21, 27 (1991);  
3 *see also Stoner v. Santa Clara Cty. Office of Educ.*, 502 F.3d 1116, 1125 (9th Cir.  
4 2007). To succeed in bringing a personal capacity claim against a state employee  
5 under § 1983, “a plaintiff must plead that each government-official defendant,  
6 through the official's own individual actions, has violated the Constitution.” *Iqbal*,  
7 556 U.S. at 675.

8        On its face, the caption of the Complaint raises claims against Defendant  
9 Batiste only in his official capacity. As discussed above, the Eleventh Amendment  
10 precludes such claims. However, the body of the Complaint alleges facts that  
11 suggests personal capacity claims. Thus, the question is whether the Complaint  
12 adequately pleads a claim that Defendant Batiste in his personal capacity (1)  
13 violated Plaintiff’s Fifth Amendment right to property; and (2) further engaged in  
14 conduct that was not objectively reasonable.

15        Plaintiff alleges that Defendant Batiste violated his Fifth Amendment right  
16 to property by depriving him of the proper application of his veteran promotional  
17 points on the date that they should have been applied. Plaintiff’s assertion that  
18 Batiste personally maintained a role in denying, delaying, or curtailing the amount  
19 of employees’ available veteran points is an adequate factual hook from which this  
20 Court can infer possible liability. Therefore, dismissal of the claim against  
21 Defendant Batiste in his personal capacity only—as referenced in the body of  
22 Plaintiff’s original Complaint—is improper.

### 23        **PLAINTIFF’S CROSS-MOTION TO AMEND COMPLAINT**

24        The Court next considers Plaintiff’s Cross-Motion to Amend Complaint,  
25 ECF No. 8. Although Plaintiff has not formally moved to amend, the Court  
26 construes Plaintiff’s response to the Motion to Dismiss as a Cross-Motion to  
27 Amend his complaint. Ultimately, the Court must decide whether Plaintiff’s  
28 motion will succeed on procedural grounds. Local Rule 7(i)(2)(A) requires the  
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1 hearing for a non-dispositive motion to occur at least 30 days after the motion's  
2 filing. Plaintiff's proposed Amended Complaint was noted without hearing on June  
3 18, 2020. Plaintiff executed the document on May 31. ECF No. 8-1 at 12.  
4 Although Local Civil Rule 7(c)(2)(B) permits represented parties 14 days to  
5 respond to a non-dispositive motion, Plaintiff's error shortens Defendants'  
6 response time to a seven-day window. *See* ECF No. 7. This seven-day window  
7 expired on June 8, seven days after Plaintiff filed his Motion to Amend. *See* ECF  
8 No. 7; ECF No. 8.

9 Although Rule 15 liberally allows parties leave to amend, Plaintiff's motion  
10 must still be absent any evidence of bad faith, undue delay, or undue prejudice to  
11 Defendants. A shortened response time unduly prejudices Defendants as they were  
12 denied an opportunity to present facts or evidence which would have been offered  
13 had Plaintiff's motion complied with Local Rule 7(i)(2)(A). Thus, Plaintiff's cross-  
14 motion to amend is denied as untimely. Additionally, it is unclear how the  
15 proposed amendment modified the claims from Plaintiff's original Complaint.

16 Accordingly, **IT IS HEREBY ORDERED:**

17 1. The Defendants' Rule 12(b)(6) Motion to Dismiss, ECF No. 3, is

18 **GRANTED IN PART** and **DENIED IN PART**.

19 2. Plaintiff's 42 U.S.C. § 1983 claims against the State of Washington, the  
20 Washington State Patrol, and Chief John Batiste in his official capacity  
21 are **DISMISSED WITH PREJUDICE**.

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CROSS-MOTION TO AMEND ^ 5**

1 3. Plaintiff's Cross-Motion to Amend their Complaint, ECF No. 8, is  
2 **DENIED with leave to renew.** Any subsequent motions to amend must  
3 comply with local and federal rules of procedure.

4 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
5 file this Order and provide copies to counsel.

6 **DATED** this 16th day of July 2020.



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12 Stanley A. Bastian  
13 United States District Judge  
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